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Perform Criminal Background Checks at Your Peril

A federal policy intended to help minorities is likely to have the opposite effect.

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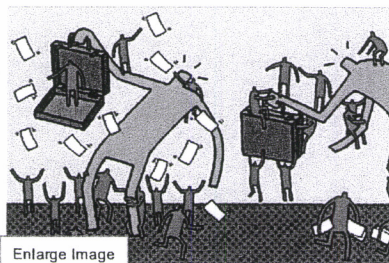
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By JAMES BOVARD

Should it be a federal crime for businesses to refuse to hire ex-convicts? Yes, according to the Equal Employment Opportunity Commission, which recently released 20,000 convoluted words of regulatory "guidance" to direct businesses to hire more felons and other ex-offenders.

In the late 1970s, the EEOC began stretching Title VII of the 1964 Civil Rights Act to sue businesses for practically any hiring practice that adversely affected minorities. In 1989, the agency sued Carolina Freight Carrier Corp. of Hollywood, Fla., for refusing to hire as a truck driver a Hispanic man who had multiple arrests and had served 18 months in prison for larceny. The EEOC argued that the only legitimate qualification for the job was the ability to operate a tractor trailer.



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U.S. District Judge Jose Alejandro Gonzalez Jr., in ruling against the agency, said: "EEOC's position that minorities should be held to lower standards is an insult to millions of honest Hispanics. Obviously a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves."

The EEOC ignored that judicial thrashing and pressed on. Last April, the agency unveiled its "Enforcement Guidance on the Consideration of arrest and Conviction Records in Employment Decisions," declaring that "criminal record exclusions have a disparate impact based on race and national origin."

Though blacks make up only 13% of the U.S. population, more blacks were arrested nationwide for robbery, murder and manslaughter in 2009 than whites, according to the FBI. The imprisonment rate for black men "was nearly 7 times higher than White men and almost 3 times higher than Hispanic men," notes the EEOC. These statistical disparities inspired the EEOC to rewrite the corporate hiring handbook to level the playing field between "protected groups" and the rest of the workforce.

Most businesses perform criminal background checks on job applicants, but the

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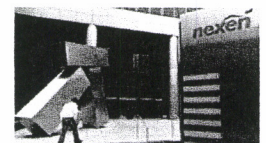
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EEOC guidance frowns on such checks and creates new legal tripwires that could spark federal lawsuits. One EEOC commissioner who opposed the new policy, Constance Barker, warned in April that "the only real impact the new Guidance will have will be to scare business owners from ever conducting criminal background checks. . . . The Guidance tells them that they are taking a tremendous risk if they do."

If a background check discloses a criminal offense, the EEOC expects a company to do an intricate "individualized assessment" that will somehow prove that it has a "business necessity" not to hire the ex-offender (or that his offense disqualifies him for a specific job). Former EEOC General Counsel Donald Livingston, in testimony in December to the U.S. Commission on Civil Rights, warned that employers could be considered guilty of "race discrimination if they choose law abiding applicants over applicants with criminal convictions" unless they conduct a comprehensive analysis of the ex-offender's recent life history.

It is difficult to overstate the EEOC's zealotry on this issue. The agency is demanding that one of Mr. Livingston's clients—the Freeman Companies, a convention and

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about their criminal records.

The biggest bombshell in the new guidelines is that businesses complying with state or local laws that require employee background checks can still be targeted for EEOC lawsuits. This is a key issue in a case the EEOC commenced in 2010 against G4S Secure Solutions after the company refused to hire a twice-convicted Pennsylvania thief as a security guard.

G4S provides guards for nuclear power plants, chemical plants, government buildings and other sensitive sites, and it is prohibited by state law from hiring people with felony convictions as security officers. But, as G4S counsel Julie Payne testified before the U.S. Commission on Civil Rights this past December, the EEOC insists "that state and local laws are pre-empted by Title VII" and is pressuring the company "to defend the use of background checks in every hiring decision we have made over a period of decades."

The EEOC's new regime leaves businesses in a Catch-22. As Todd McCracken of the National Small Business Association recently warned: "State and federal courts will allow potentially devastating tort lawsuits against businesses that hire felons who commit crimes at the workplace or in customers' homes. Yet the EEOC is threatening to launch lawsuits if they do not hire those same felons."

At the same time that the EEOC is practically rewriting the law to add "criminal offender" to the list of protected groups under civil-rights statutes, the agency refuses to disclose whether it uses criminal background checks for its own hiring. When EEOC Assistant Legal Counsel Carol Miaskoff was challenged on this point in a recent federal case in Maryland, the agency insisted that revealing its hiring policies would violate the "governmental deliberative process privilege."

The EEOC is confident that its guidance will boost minority hiring, but studies published in the University of Chicago Legal Forum and the Journal of Law and Economics have found that businesses are much less likely to hire minority applicants when background checks are banned. As the majority of black and Hispanic job applicants have clean legal records, the new EEOC mandate may harm the very groups it purports to help.

Naturally, the EEOC will have no liability for any workplace trouble that results from its new hiring policy. But Americans can treat ex-offenders humanely without giving them legal advantages over similar individuals without criminal records. The EEOC's new regulatory regime is likely to chill hiring across the board and decrease opportunities for minority applicants.

Mr. Bovard is the author, most recently, of a new e-book memoir, "Public Policy

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Legal Report

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EEOC Forces Employers To Strike a Delicate Balance

By Eric R. Harlan

If ever there was a time for employers to review their hiring and retention practices, it's now. Today, employers are walking a virtual tightrope in their efforts to avoid employee-related litigation from both the government and the private sector.

In April 2012, the U.S. Equal Employment Opportunity Commission (EEOC) released enforcement guidance warning employers that use of criminal background checks on potential or present employees may violate Title VII of the Civil Rights Act of 1964, and lead to an investigation and perhaps a civil enforcement action.

At the same time, employers that fail to investigate criminal backgrounds can just as easily find themselves liable for claims of

negligent hiring and retention. Such suits can cost small businesses tens of thousands of dollars to litigate—not to mention the cost of satisfying a judgment if found liable.

Striking a balance between the threat of an EEOC investigation and a negligent hiring lawsuit isn't a simple task in today's regulatory environment. A careful review of hiring practices, however, can mitigate the risk of litigation.

EEOC Guidance

The EEOC's new guidance is based on data demonstrating disproportionate arrest and conviction records among Hispanic and black individuals.

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For example, according to studies cited by the EEOC, black men account for nearly 30 percent of all arrests, though they make up less than 15 percent of the population. In addition, in 2010, black men were imprisoned at a rate more than 6.5 times higher than white men, and Hispanics were imprisoned at a rate nearly three times higher than white men.

Against this statistical disparity, the EEOC reaffirmed its policy to guard against the discriminatory use of criminal background information. The new guidance does not prohibit employers from using criminal background reports when making hiring decisions. It does, however, broaden what the EEOC would consider discriminatory use of such reports.

Discriminatory use of criminal records takes two forms: disparate treatment and disparate impact. Disparate treatment occurs when an employer disqualifies a minority applicant based on a criminal conviction but hires or retains a member of a nonprotected class who has the same record.

Disparate impact is not so obvious. It occurs when a hiring practice is applied equally to all applicants or employees, regardless of race, national origin, etc., but members of a protected class are nonetheless disproportionately impacted despite the across-the-board neutral hiring policy.

Although the EEOC acknowledges that a conviction record, as opposed to an arrest record, suffices as evidence that a person engaged in particular conduct, it concludes that there may be reasons for an employer not to rely on a conviction record alone when making employment decisions. Further, the EEOC's guidance warns that if employers automatically exclude from consideration all applicants with criminal records, black and Hispanic individuals will likely be disproportionately impacted.

In that case, an employer will need to demonstrate that the exclusions are "job related and consistent with business necessity" in order to avoid disparate impact discrimination liability. This may prove to be an onerous burden for some employers.

According to the guidance, to establish this defense, employers will have to develop a "targeted screen" that considers, at a minimum, the nature of the crime, the time elapsed and the nature of the job. They also may have to conduct an individualized assessment of those individuals identified by the screen.

Moreover, the guidance enumerates no less than eight specific factors for an employer to consider when making the individualized assessment:

- The facts and circumstances surrounding the offense or

conduct.

- The number of offenses for which the individual was convicted.
- Age at the time of conviction or release from prison.
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
- The length and consistency of employment history before and after the offense or conduct.
- Rehabilitation efforts (e.g., education/training).
- Employment or character references and any other information regarding fitness for the particular position.
- Whether the individual is bonded under a federal, state or local bonding program.

Thus, the result of a criminal background check does not end the hiring determination; it is just the beginning of what could be an expensive and time-consuming process.

Exposure to Negligent Hiring Claims

Despite the expanded burden the EEOC guidance places on employers that conduct criminal background checks, those employers simply cannot respond by abandoning background checks altogether. While doing so will minimize Title VII liability, it will also expose employers to near certain liability for negligent hiring.

Consider the guest services employee with a discoverable battery conviction who assaults and injures a patron of his employer, or the landlord's maintenance employee with a burglary record who steals from tenants' apartments. In both instances, the employers would have been well-advised to have conducted a criminal background check before hiring these individuals.

Employers facing negligent hiring complaints have a losing track record, as plaintiffs prevail in the majority of cases that are tried to verdict. Simply put, employers can no more ignore employee criminal backgrounds than they can ignore the EEOC guidance. An employer's solution to this new regulatory reality is to review its hiring and retention practices and determine the most efficient process by which to minimize potential tort and Title VII liabilities.

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